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IN THE SUPREME COURT OF THE STATE OF IDAHO

THE GREASE SPOT, INC.,

Plaintiff/Respondent,

vs.

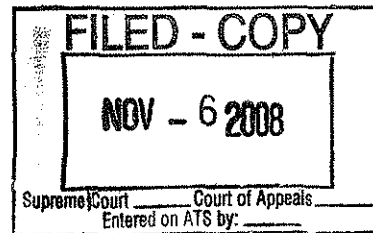
RICHARD and SHERRY HARNES,
husband and wife,

Defendants/Appellants,

and BAKER COMMODITIES, INC., a
Delaware Corporation, and JOHN DOES
1-10,

Defendants.

Supreme Court Docket No. 35321



APPELLANTS' REPLY BRIEF

Appeal from the District Court of the
First Judicial District for Kootenai County

Honorable Charles W. Hosack, District Judge, Presiding

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Statutes

I.R.C.P. § 54(d)(1)(B)

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Idaho Code §§ 7-911, 7-914

Idaho Code § 9-714

Idaho Code § 12-120(3)

Idaho Code § 9-714

I. ARGUMENT

Harnes stand on the arguments in their opening brief with respect to the arguments advanced by Grease Spot on part A of its argument on whether Harnes are entitled to recover attorney fees incurred in arbitration. Harnes therefore focus in this brief on the argument raised by Grease Spot in part B whether Harnes are entitled to attorney fees incurred before and after arbitration.

1. The standard of review.

Grease Spot correctly notes that the determination of who is the prevailing party is within the trial court's sound discretion and will not be disturbed unless there is an abuse of that discretion. *Trilogy Network Systems, Inc. v. Johnson*, 144 Idaho 844, 172 P.3d 1119, 1122 (2007), citing *Farm Credit Bank of Spokane v. Wissel*, 122 Idaho 565, 568, 836 P.2d 511, 514 (1992).

The abuse of discretion analysis is well established.

When examining whether a trial court abused its discretion, this Court considers:

(1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of this discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason.

Id. [*Farm Credit*, 122 Idaho at 568, 836 P.2d at 514] (citing *Sun Valley Shopping Ctr., Inc. v. Idaho Power*, 119 Idaho 87, 803 P.2d 993 (1991)).

Trilogy Network, 144 Idaho at 847; 172 P.3d at 1122.

2. Grease Spot argues that the trial court acted within the bounds of its discretion by determining that the only issue on which Harnes prevailed at the trial court was the issue compelling arbitration. R., p. 80. The trial court went on to explain its ruling that the only issue on which Harnes prevailed in the trial court was the issue of compelling arbitration.

Because of the Judgment entered dismissing the Complaint of the Grease Spot on the merits, the Court holds that the judgment entered herein is not inconsistent with its findings that Harnes prevailed on the issue of compelling arbitration. The Court expresses no opinion as to whether Harnes would be entitled to Fees and costs if the Grease Spot had obtained a money judgment against Harnes pursuant to arbitration award confirmation proceedings. It may very well be that the ultimate resolution on the merits by the arbitrator should be irrelevant, but this is not an issue this Court needs to decide.

R., p. 81.

It is true that who prevails on the claims pled does not necessarily decide the question of prevailing party. For example, in *Mihalka v. Shepherd*, 145 Idaho 547, 476-77, 181 P.3d 473 (2008), the trial court had enforced a settlement agreement reached at mediation and declared the party seeking to enforce the settlement agreement to be the prevailing party. The plaintiff had not pled the breach of the settlement agreement as a claim, but sought to enforce the settlement agreement that resolved the claim. The trial court determined, considering the factors set forth in I.R.C.P. 54(d)(1)(b)¹ that the plaintiff was the prevailing party and

¹ I.R.C.P. 54(d)(1)(B) provides: Prevailing Party. In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion

awarded the plaintiff its attorney fees limited to its fees and costs incurred in enforcing the settlement agreement. The settlement agreement contained an attorney fee provision. This court held, citing *Goodman v. Lothrop*, 143 Idaho 622, 625, 151 P.3d 818, 821 (2007) that the settlement agreement superseded and extinguished all pre-existing claims the parties intended to settle. Therefore who prevailed on the question of the enforcement of the settlement agreement properly determined who qualified as the prevailing party.

That situation is different from the one in this case, as the settlement agreement superseded the claims pled. The motion to compel arbitration did not supersede the pleadings or transmute the dispute into something other than a claim over a commercial transaction. It merely changed the forum in which the dispute was decided.

The cases are few and far between in which the appellate courts of Idaho have found an abuse of discretion in determining the prevailing party, but there are limits. In *Platt v. Brown*, 120 Idaho 41, 813 P.2d 380 (Ct.App. 1991), the Court determined that the trial court had abused its discretion in awarding attorney fees against a defendant in a quiet title action who had been named solely because she was included in the chain of title and who had been dismissed on the first day of trial by stipulation of the parties. On that same day the parties

consider the final judgment or result of the action in relation to the relief sought by the respective parties. The trial court in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained.

stipulated to quiet title to the property in the plaintiff. The trial then proceeded on a claim for fraud against the co-defendant. After the trial court awarded the plaintiff its costs incurred in bringing the action and exemplary damages against the co-defendant, the trial court modified its award on the motion of the co-defendant removing the exemplary damages but awarding costs and attorney fees to the plaintiff and against the co-defendant. Even though the complaint prayed for attorney fees only against the co-defendant the plaintiff submitted an amended judgment awarding the plaintiff attorney fees and costs against "the defendants." This judgment was entered, despite findings and conclusions prepared by the trial court that formed the basis of the amended judgment, which made no mention of the defendant who had been dismissed on the day of trial. The plaintiff subsequently obtained execution against the dismissed defendant.

The Court held that because the trial court made no findings showing that the dismissed defendant was entitled to attorney fees, the entry of judgment against the dismissed defendant was an abuse of discretion. The Court of Appeals reasoned that the plaintiff named the dismissed defendant in the quiet title action without alleging any acts of wrongdoing on her part. The plaintiff stipulated to dismissal of the defendant from the action without making any claim against her for costs or fees. The Court of Appeals determined that on these facts the plaintiff could not be a prevailing party against the dismissed defendant and the dismissed defendant's defense was as a matter of law not frivolous.

The trial court in this case apparently concluded that the arbitration award was

irrelevant to the determination of the prevailing party, stating, “Since this matter went into arbitration, a court would have to refer to the arbitration proceeding itself to conduct an analysis of the prevailing party.” R., p. 80. However, the trial court used the arbitration award to confirm the award and enter judgment. R., p. 51-52. The trial court characterized this as a dismissal of the action. R., p. 81.

In *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 117 P.3d 130 (2005) this Court considered language from *Chenery v. Agri-Lines Corp.*, 106 Idaho 687, 682 P.2d 640 (Ct.App.1984), “Mere dismissal of a claim without trial does not necessarily mean that the party against whom the claim was made is a prevailing party for the purpose of awarding costs and fees.” The trial court had observed in determining that no party was the prevailing party that defendant Nord Excavating was dismissed after a motion for directed verdict and the jury had awarded Nord Excavating less than a tenth of the damages it was seeking in its counterclaim. This Court noted that the trial court “did not mention the outcome in Reed's and Nord Excavating's favor as defendants, and wrote that ‘[t]aking into consideration the claims, counterclaims and damages alleged and recovered by the parties, neither of the 'parties' prevailed in this case.’”

Because Nord Excavating had been dismissed on directed verdict and had prevailed in its counterclaim, viewing its success “from an overall standpoint” this Court had no trouble determining that Nord Excavating was a prevailing party. This court reasoned:

Viewing its success from an overall standpoint, Nord Excavating was a prevailing party. In ruling it was not, the

district court focused too much attention on the Company's less than tremendous success on its counterclaim and seemingly ignored the fact that the Company avoided all liability as a defendant. The district court improperly undervalued the Company's successful defense. Avoiding liability is a significant benefit to a defendant. In baseball, it is said that a walk is as good as a hit. The latter, of course, is more exciting. In litigation, avoiding liability is as good for a defendant as winning a money judgment is for a plaintiff. The point is, while a plaintiff with a large money judgment may be more exalted than a defendant who simply walks out of court no worse for the wear, courts must not ignore the value of a successful defense. In this case, logic suggests that a verdict in Nord Excavating's favor and a victory on its counterclaim (albeit, a relatively small one), by definition, makes it a prevailing party.

Eighteen Mile Ranch, 141 Idaho at 719, 117 P.3d at 133. In this case, just as in *Eighteen Mile Ranch* the defendants Harnes left the civil litigation with “the most favorable outcome that could possibly be achieved.” *Id.*, quoting from *Daisy Mfg. Co., Inc. v. Paintball Sports*, 134 Idaho 259, 262, 999 P.2d 914, 919 (Ct.App.2000).

As a matter of law, Harnes were the prevailing party and the trial court's characterization of Harnes as the prevailing party only in their successful attempt to compel arbitration is just inconsistent with the relief obtained by Harnes and was an abuse of discretion.

Grease Spot argues that the dispute over the “commercial transaction” was resolved by the arbitrator's Memorandum Decision; therefore, all activity in the civil litigation after the arbitrator's award consisted solely of the Harnes' “quest” for “post judgment attorney fees.” Grease Spot argues that “post judgment attorney fees are awardable only with respect

to attempts to collect on a judgment.”

Grease Spot’s analysis ignores the law. An arbitrator’s award is not self-executing. It must be confirmed by the trial court and reduced to a judgment to be enforceable. Idaho Code §§ 7-911, 7-914. In no-wise does an arbitrator’s award constitute a judgment.

Grease Spot also quarrels without citation to authority that attorney fees incurred in pursuing attorney fees are not recoverable. Grease Spot’s citation to *Koelker v. Turnbull*, 127 Idaho 262, 899 P.2d 972 (1995) is inapposite, as it does not stand for the proposition that the Harnes are not entitled to attorney fees in obtaining judgment. Grease Spot ignores that there are independent bases for an award of attorney fees to the Harnes, Idaho Code § 12-120(3) and Idaho Code § 9-714, which were not available to the prevailing party in *Koelker*.

To be sure Idaho Code § 9-714 does by use of the word “may” impart discretion to the trial court, but no more so than does I.R.C.P. 54(e)(1). *Driver v. SI Corp.*, 139 Idaho 423, 80 P.3d 1024 (2003), cited by both parties in this case, involved protracted confirmation challenges that the trial court in that case found non-meritorious. *Driver* does not require, however, that the party against whom confirmation is sought and judgment is entered must take a non-meritorious position in order for the prevailing party to qualify for an attorney fee award based on Idaho Code § 12-120(3) or Idaho Code § 9-714. *Deerstra v. Hagler*, 145 Idaho 922, 188 P.3d 864 (2008).

II. CONCLUSION

As a matter of law, Harnes are the prevailing parties in the civil litigation despite the

referral of the matter to arbitration based on the Harnes' motion over the objection of Grease Spot. Harnes are at a minimum entitled to their attorney fees before and after the referral to arbitration. As said in the opening appellants' brief, Harnes are entitled to their attorney fees incurred in the arbitration, too. Harnes ask this court to reverse the decision of the trial court limiting their status as prevailing party only to the issue of compelling arbitration and remand to the trial court with directions to award attorney fees incurred in arbitration and to reconsider the question of attorney fees incurred before and after arbitration based on *Deerstra*.

RESPECTFULLY SUBMITTED this 4 day of November, 2008.

RAMSDEN & LYONS, LLP

By 


Michael E. Ramsden, Of the Firm
Attorneys for Defendants/Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4 day of November, 2008, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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